

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JOSEPH BIRCH,)	
)	
Plaintiff,)	C.A. No. 05-799 (JJF)
)	
v.)	
)	
E. I. DUPONT DE NEMOURS)	
& CO., INC.,)	
)	
Defendant.)	

MOTION TO DISMISS
OR, IN THE ALTERNATIVE, TO COMPEL

Pursuant to Federal Rules of Civil Procedure 37 and 41, Defendant E. I. du Pont de Nemours and Company ("DuPont") hereby moves the Court for an order dismissing this action with prejudice due to Plaintiff's failure to respond to written discovery, appear for his deposition, or otherwise prosecute this action. In the alternative, at the very least, DuPont requests that Plaintiff Joseph Birch ("Plaintiff") be compelled to cooperate with discovery. The grounds for this motion are as follows:

1. Plaintiff filed this employment discrimination action *pro se* on November 17, 2005. Service was not effected upon DuPont until May 31, 2006. DuPont timely answered the complaint, denying all material allegations and asserting numerous affirmative defenses including that Plaintiff voluntarily resigned his employment when confronted with a disciplinary warning for poor performance.

2. The Court entered a Scheduling Order on March 21, 2007. (D.I. 12) The Scheduling Order required the parties to exchange the information required by Fed. R. Civ. P. 26(a)(1) and D. Del. L. R. 16.2 by May 4, 2007. DuPont served its Initial Disclosures Pursuant to Fed. R. Civ. P. 26(a) on May 3, 2007. (D.I. 13) Plaintiff failed to serve Initial Disclosures.

3. Pursuant to the Scheduling Order, discovery closes in this action on August 31, 2007. On July 17, 2007, the undersigned counsel wrote to Plaintiff and demanded that he immediately serve Initial Disclosures as required by the Scheduling Order and federal rules. (7/17/07 Letter to Plaintiff attached as Ex. A.) To date, Plaintiff has failed to serve Initial Disclosures and has otherwise completely failed to respond to counsel's letter of July 17, 2007.

4. Also on July 17, 2007, DuPont served Plaintiff with its First Set of Interrogatories and Requests for the Production of Documents. (Attached as Exs. B and C.) Plaintiff's responses were due August 20, 2007. To date, Plaintiff has failed to respond to the written discovery.

5. DuPont served Plaintiff with a Notice of Deposition by Federal Express on August 14, 2007, which required him to appear at Potter Anderson & Corroon LLP on August 28, 2007 at 10:00 a.m. for his deposition. (D.I. 17)

6. On August 21, 2007, the undersigned again wrote to Plaintiff, this time demanding that he immediately serve Initial Disclosures *and* respond to DuPont's First Set of Interrogatories and Requests for Production. (8/21/07 Letter to Plaintiff attached as Ex. D.) The letter also reiterated to Plaintiff that he had been "served with a Notice of Deposition, which requires you to appear for a deposition on August 28, 2007." *Id.* Again, Plaintiff did not respond to this letter.

7. On August 28, 2007 at 10:00 a.m., defense counsel and a court reporter were present for Plaintiff's deposition – Plaintiff did not appear. (Transcript of deposition proceedings attached as Ex. E.) The undersigned called Plaintiff at the telephone number indicated on his complaint at approximately 10:12 a.m. and left a voicemail message inquiring as to whether he intended to appear for his scheduled deposition. Plaintiff did not respond to this message, nor

did he otherwise contact DuPont. At approximately 10:30 a.m., DuPont adjourned the deposition due to Plaintiff's failure to appear.

8. Defense counsel and the court reporter thus waited for Plaintiff to appear on the morning of August 28 for over 30 minutes before counsel adjourned the deposition. As a result of Plaintiff's failure to appear, DuPont incurred unnecessary court reporter and counsel fees.

9. Federal Rule of Civil Procedure 41(b) provides DuPont with the right to move for the involuntary dismissal of an action for failure of the plaintiff to prosecute or to comply with the Federal Rules of Civil Procedure or any order of the court. Moreover, Federal Rule of Civil Procedure 37(b)(2) provides for a number of options, including dismissal of the action, when a party fails to obey an order to provide or permit discovery. Moreover, Federal Rule of Civil Procedure 37(d) provides for a number of options, including dismissal of the action, when a party fails to appear for a deposition. As set forth above, Plaintiff has *repeatedly* refused to provide and permit discovery, and has utterly failed to comply with the Federal Rules of Civil Procedure.

10. For the reasons set forth above and given Plaintiff's complete disregard for the Federal Rules of Civil Procedures, and his responsibility to prosecute this action diligently, DuPont respectfully requests that an Order be entered dismissing this action with prejudice. (A form of order dismissing the action is attached as Ex. F.)

11. In the alternative, DuPont respectfully requests that an Order be entered in the form attached hereto as Exhibit G. DuPont's proposed order provides: (a) that Plaintiff respond to the outstanding discovery requests and file Initial Disclosures no later than September 4, 2007; (b) that Plaintiff appear for his deposition no later than September 11, 2007; and (c) that if

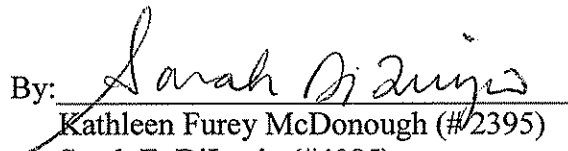
Plaintiff fails to do either or both of the aforementioned that his case be dismissed with prejudice.

12. Finally, DuPont requests that it be reimbursed for the costs and attorneys' fees it incurred due to Plaintiff's failure to respond to discovery and his failure to appear at his deposition pursuant to Federal Rule of Civil Procedure 37(a)(4), (b)(2) and (d)(1).

WHEREFORE, Defendant E. I. du Pont de Nemours and Company respectfully requests that its Motion to Dismiss or, in the alternative, to Compel be GRANTED.

Respectfully submitted,

POTTER ANDERSON & CORROON LLP

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Attorneys for Defendant

E. I. du Pont de Nemours and Company

Dated: August 28, 2007
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